IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6358 OF 2004

Sindhu Vishwanath Phadake ..
Petitioner.
Vs.
The Principal,
Kendriya Vidyalaya, Pune & Ors. ..
Respondents.

....

Mr. A.G. Toraskar for the Petitioner.
Mr. Suresh Kumar for the Respondents.

...

CORAM: KSHITIJ R. VYAS, C.J. &
DR.D.Y.CHANDRACHUD, J.

4th May, 2006.

ORAL JUDGMENT (Per DR. D.Y. CHANDRACHUD, J.):

1. The Petitioner joined service as a teacher in the Adarsh Vidya Bhavan School on 1st November, 1957 where he worked until 24th June, 1973. The School was taken over by the Kendriya Vidyalaya Sangathan from 25th June, 1973. The Petitioner continued to work until 31st October, 1985 when she attained the age of superannuation of 60 years. The Petitioner was a contributory to the Central Provident Fund Scheme. A request was

made by the Petitioner for being allowed to switch over to the pension scheme. That request was turned down and thereupon the Petitioner moved the Central Administrative Tribunal. The Tribunal dismissed the application filed by the Petitioner by its order dated 29th May, 2001 which is impugned in these proceedings.

2. The Tribunal noted that the pension scheme was made applicable to the Kendriya Vidyalaya Sangathan by an Office Memorandum dated 1st September, 1988. The Tribunal noted that under the terms thereof all those who had retired on or after 1st January, 1986 were eligible for pension. However, the Office Memorandum provided that a separate scheme of ex gratia was being worked out in respect of those CPF retirees who had retired prior to 1st January, 1986. In the circumstances, the Tribunal held that the Petitioner who had retired prior to the cut off date of 1st January, 1986 was not entitled to the benefit of the newly introduced pension scheme.

3. On behalf of the Petitioner reliance has been placed on the judgment of the Supreme Court in **D.S. Nakara v. Union of India**, (AIR 1983 SC 130) and to a judgment of a Division Bench of this Court in **Shaila D. Varerkar v. State of Maharashtra** (1999 II CLR 282) which followed the judgment of the Supreme Court. Counsel appearing for the Petitioner urged that there was no rationale in applying the cut off date of 1st January, 1986 and that the Petitioner should be granted full pensionary benefits.

3A. While considering the submissions which have been urged on behalf of the Petitioner, it would be necessary to advert to the Office Memorandum dated 1st September, 1988. By this Office Memorandum it is recorded that in the 51st meeting of the Board of Governors of the Kendriya Vidyalaya Sangathan held on 31st May, 1988 a decision was taken to implement mutatis mutandis the decision taken by the Government of India on the recommendations of the Fourth Central Pay Commission for allowing its employees a change over from the Contributory Provident Fund scheme to the pension scheme. Consequently, it was decided that persons who join service in the Sangathan on or

after 1st January, 1986 shall be governed only by the GPF cum pension scheme and will have no option to be governed by the CPF scheme. However, all CPF beneficiaries who were in service as on 1st January, 1986 and who continued to be in service on the date of issuance of the Memorandum will be deemed to have come over to the pension scheme. Such employees, however, were given an option to continue under the CPF scheme if they so desired. In so far as the CPF beneficiaries who had retired prior to 1st January, 1986 were concerned, clause 5 of the Office Memorandum stipulated that a proposal to grant ex gratia payment to such persons was separately under consideration and orders in that behalf would be issued in due course. Accordingly, on 5th October, 1988 orders were issued by the Kendriya Vidyalaya Sangathan for the payment of ex gratia to those employees inter alia who had retired prior to 1st January, 1986.

5. The Central Administrative Tribunal rejected the plea of the Petitioner which was to the effect that the Petitioner should be allowed to opt for the pension scheme even though the date of

retirement was prior to 1st January, 1986. In holding thus, the Tribunal relied upon the Office Memorandum dated 1st September, 1988 and came to the conclusion that the Petitioner being a CPF beneficiary who had retired prior to 1st January, 1986 was not entitled to pension.

5. On behalf of the Petitioner reliance has been placed on the judgment of the Supreme Court in **D.S. Nakara v. Union of India**, (AIR 1983 SC 130). The judgment of the Supreme Court in Nakara has been revisited in several subsequent decisions and it is now a settled principle of law that a clear distinction exists between a situation where an existing pensionary scheme is liberalized and one where a new scheme is introduced. The liberalized pension scheme in the context of which the decision was rendered in Nakara

provided for computation of pension according to a more liberal formula under which “average emoluments” were determined with reference to the last ten months' salary instead of 36 months' salary provided earlier yielding a higher average, coupled with a slab system and raising the ceiling limit for pension. The Supreme

Court held that where the mode of computation of pension is liberalized from a specified date, its benefit must be given not merely to retirees subsequent to that date but also to earlier existing retirees irrespective of their date of retirement even though the earlier retirees would not be entitled to any arrears prior to the specified date on the basis of the revised computation made according to the liberalized formula. The decision in Nakara came up for consideration before a Constitution Bench in **Krishena Kumar v. Union of India** ((1990) 4 SCC 207). The Petitioners before the Supreme Court were retired railway employees who were covered by or opted for the Railway Contributory Provident Fund Scheme. The Supreme Court held that P. F. retirees and pension retirees constitute different classes and Nakara does not hold that both pension retirees and P.F. Retirees formed a homogeneous class. These decisions have once again been considered by a Constitution Bench of the Supreme Court in **Indian Ex-Services League v. Union of India** (AIR 1991 SC 1182). While referring to Nakara's case and the subsequent decision of the Constitution Bench in Krishena Kumar, the Supreme Court

held thus :

> "Nakara (AIR 1983 SC 130) decision came up for consideration before another Constitution Bench recently in Krishena Kumar v. Union of India (1990) 4 SCC 207 : (AIR 1990 SC 1782). The petitioners in that case were retired Railway employees who were covered by or opted for the Railway Contributory Provident Fund Scheme. It was held that P. F. retirees and pension retirees constitute different classes and it was never held in Nakara that pension retirees and P.F. Retirees formed a homogeneous class, even though pension retirees alone did constitute a homogeneous class within which any further class notification for the purpose of a liberalised pension scheme was impermissible. It was pointed out that in Nakara, it was never required to be decided that all the retirees for all purposes formed one class and no further classification was permissible. We have referred to this decision merely to indicate that another Constitution Bench of this Court also has read Nakara decision as one of limited application and there is no scope for enlarging the ambit of that decision to cover all claims made by the pension retirees or a demand for an identical amount of pension to every retiree from the same rank irrespective of the date of retirement, even though the reckonable emoluments for the purpose of computation of their pension be different."

6. In **All India Reserve Bank Retired Officers Association v. Union of India** (AIR 1992 SC 767), the Supreme Court held that when the State decides to revise and liberalize an existing pension scheme with a view to augmenting the social security cover

granted to pensioners, it cannot ordinarily grant the benefit to a section of the pensioners and deny the same to others by drawing an artificial cut off line which cannot be justified on rational grounds and is wholly unconnected with the object intended to be achieved. But when an employer introduces an entirely new scheme which has no connection with the existing scheme, different considerations enter the decision making process. Once such consideration may be the financial implications of the scheme and the extent of capacity of the employer to bear the burden. Bearing in mind the capacity to absorb the financial burden, the employer would have to decide upon the extent of applicability of the scheme. The Supreme Court also held that the cut off date of 1st January, 1986 was not arbitrarily fixed by the authorities of the bank or by the Central Government and there was no malafide attempt to deprive those who have retired before 1st January, 1986. The rational for fixing the date as 1st January, 1986 was the same as the case of Central Government employees based on the recommendations of the Fourth Central Pay Commission. The next decision to which it would be instructive to make a reference is

the judgment of the Supreme Court in **Union of India v. P.N. Menon** (AIR 1994 SC 2221). The principle of law which was formulated in the aforesaid decision was thus :

> "Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution frames a scheme for persons who have superannuated from service, due to many constraints, it is not always possible to extend the some benefits to one and all, irrespective of dates of superannuation. As such any revised scheme in respect of post-retirement benefits, if implemented with a cut-off date, which can be held to be reasonable and rational in the light of Article 14 of the constitution need not be held to be invalid. It shall not amount to 'picking out a date from the hat' as was said by this Court in the case of D. R. Nim v. Union of India, AIR 1967 SC 1301, in connection with fixation of seniority. Whenever a revision takes place, a cut off date becomes imperative, because the benefit ' has to be allowed within the financial resources available with the Government."

Similarly, in **Union of India v. Lieut (Mrs.) E. Iacats** (1997 (7) SCC 334), the Supreme Court rejected a similar plea with the following observations :

> "THE next question relates to payment of pension. Under Army Instruction No.14 which was in force at the material

time, the respondent, either on the date of her appointment or on the date of her retirement, or at any time during her service, did not have the benefit of pension on retirement. The terms and conditions of service were known to her at the time when she joined the service. At the time of joining service she had signed an agreement to abide by the rules and regulations governing Military Nursing Service (Local) from time to time. She has claimed that pensionary benefits which were conferred for the first time on all those who retired on or after 1/10/1983 should be given to her although she retired much prior to that date. Although she has not challenged the cut-off date as arbitrary, reliance in this connection is placed by her on the decision in the case of D.S. Nakara v. Union of India. This decision has been subsequently explained and distinguished in a number of cases. In the case of Sushma Sharma (Dr) v. State of Rajasthan this court cited with approval its earlier observations in Union of India v. Parameswamn Match Works Ltd. to the effect that the choice of a date as a basis of classification cannot always be dubbed as arbitrary unless it is capricious or whimsical. In the case of State of W. B. v. Ratan Behari Dey this court considered the pension scheme introduced by the Calcutta Municipal Corporation from 1/4/1977. It upheld the validity of the cut-off date. Nakara case was distinguished on the ground that in Nakara case by an artificial cut-off date, distinction was sought to be made between retired employees who were governed by the same rules. However, when a pension scheme is introduced from a given date, there are two sets of employees who are governed by two different sets of rules. They cannot be treated as similarly situated. As the cut-off date was retrospective, this court also examined the reasonableness of this retrospective operation. It found the cut-off date to be reasonable, it being based upon the date of appointment of the Pay Commission. In a recent decision in the case of Commander, Head Quarter v. Capt Biplabendra Chanda new rules reducing the minimum Qualifying service for pension came into effect from 1/1/1986. The respondent who had

> retired prior to this date was not granted pension under the old rules as he did not qualify for pension under those rules. This court, distinguishing Nakara case held that he cannot be retrospectively made eligible under the new rules. Pensioners under the old rules and pensioners under the new rules are not similarly situated. Each set of retiring employees will be governed by their own rules in force when they retire."

7. The same principle has been enunciated in **State of Rajasthan v. Sevanivatra Karamchari Hitkari Samiti** (1995 (2) SCC 117) and in **Hari Ram Gupta (D) Thru. L.R. Kasturi Devi v. State of U.P.** (AIR 1998 SC 2483).

8. In the present case the reliance that has been placed on the judgment in **D.S. Nakara's case**, would not in any manner advance the contention of the Petitioner. In the present case, it was for the first time that by the Office Memorandum dated 1st September, 1988 the pension scheme came to be applied to the employees of the Kendriya Vidyalaya Sangathan who were in service as on 1st January, 1986 and those who would join service thereafter. The Petitioner belongs to a class of employees who had retired prior to 1st January, 1986. This was, therefore, not a case involving a

liberalization of an existing scheme or the liberalization of the mode of computing pensionary benefits under an existing scheme. For the first time, the benefit of pension came to be granted to employees of the Sangathan. In that view of the matter, it was legitimately open to the employer to fix a cut off date and to prescribe that only those employees who were in service on the cut off date or who joined service thereafter, would be entitled to pension. Therefore, there is no substance in the plea of the Petitioner that there has been an unconstitutional discrimination. The reliance that has been placed on the decision rendered by the Division Benches of this Court in **Shaila D. Varerkar v. State of Maharashtra** (1999 II CLR 282) and the subsequent unreported decision dated 21st November, 1997 in Writ Petition 3854 of 1997 is therefore clearly misplaced. The validity of 1.1.86 as the cut off date is affirmed by the Supreme Court in AIR 1992 SC 767 (supra).

9. For all these reasons, we do not find any merit in the Petition. The Petition shall accordingly stand dismissed.

CHIEF JUSTICE

(DR. D.Y. CHANDRACHUD, J.)